CHUNG MAY YEN

v.

PUNCAKDANA DEVELOPMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[ORIGINATING SUMMONS NO: S6-24-1604-2001]
20 SEPTEMBER 2002

CONTRACT: *Housing development contract - Breach - Delay in delivering vacant possession of property - Whether caused by relevant authorities - Defence of waiver - Whether defendant entitled - Whether purchaser entitled to terminate agreement*

LAND LAW: *Housing developers - Sale and purchase agreement - Non-delivery of vacant possession - Whether delay caused by relevant authorities - Whether plaintiff waived right to terminate agreement - Whether plaintiff entitled to terminate agreement*

The plaintiff entered into a sale and purchase agreement ('agreement') with the defendant to purchase some property. The plaintiff contended that the defendant had breached the agreement when the latter failed to deliver vacant possession of the property on its contracted date. The plaintiff subsequently applied by way of an originating motion to, *inter alia*, terminate the agreement in respect of the said property. The principal issue that arose for determination in this instance was whether the plaintiff had lawfully terminated the agreement.

Held:

[1] The defendant's contention that the delay in delivering vacant possession was due to the delay on the part of the relevant authorities in approving water supply, electricity supply and sewerage treatment plant and piping was without merits. On the evidence adduced, there was no delay by the relevant authorities for such supply and works. (pp 14 a-f & 15 a-c)

[2] The time lapse between the time the notice of termination of the agreement was issued by the plaintiff to the defendant, to the time the plaintiff filed this action, was almost 12 months and yet the defendant could not deliver vacant possession. Thus, the defendant was guilty of inordinate delay and not entitled to contend that the plaintiff had waived her right to terminate the agreement. (p 16 e-h)

[Application granted.]

Case(s) referred to:
Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 ***(not foll)***

For the plaintiff - In person
For the defendant - Joseph Yeo; M/s Joseph Yeo

Reported by Raja Vishnu Sivarajah

JUDGMENT

Azmel Maamor J:
By way of an originating summons the plaintiff made an application seeking answers to the following questions:

1. Whether the plaintiff is entitled to terminate the sale and purchase agreement in respect of property under Lot No. KKBP1-24, D'Tinggian Nusa, Kuala Kubu Bahru, Selangor entered between the plaintiff and the defendant;

2. Whether the defendant is obliged to refund all monies paid by the plaintiff to the defendant; and

3. If the answers to (a) and (b) are in the affirmative, whether the defendant is obliged to pay interest on the amount to be refunded to the plaintiff.

The brief facts of the case are as follows. On 24 October 1996 the plaintiff entered into sale and purchase agreement with the defendant in respect of the purchase of a property known as Lot No. KKBP1-24 Kuala Kubu Bahru, Selangor (the said property). Section 6.04 of the said agreement stipulates that delivery of vacant possession of the said property to the plaintiff would be made within 36 months of the signing of the said agreement, that is on or before 23 October 1999.

Payments in respect of the said property were to be made progressively in accordance with the 3rd schedule of the said agreement. At the request for payment by the defendant the plaintiff had so far paid a sum of RM52.801.95 being the amount for the first five progress payments. No subsequent progress payment were requested by the defendant. On 23 October 1999 the defendant failed to deliver vacant possession of the said property to the plaintiff. On 25 May 2000 the plaintiff gave notice of termination of the said agreement to the defendant. But the defendant refused to accept the termination of the agreement by the plaintiff. Almost a year later, on 15 May 2001 the plaintiff commenced this action in court against the defendant.

The main issue to be determined in this case is whether the plaintiff had lawfully terminated the said agreement. In disputing the plaintiffs claim the

defendant raised the following defences. Firstly, the defendant argued that it had not committed any breach of the said agreement. The defendant claimed that the delay in delivering vacant possession was due to the delay on the part of the relevant authorities approving the followings:

(a) delay in securing approval for water supply;

(b) delay in approval of electricity supply;

(c) delay in securing approval for sewerage treatment plant and piping.

The defendant invoked s. 9.03 of the said agreement, which states:

> Section 9.03 Circumstances beyond the Vendor's Control
>
> Notwithstanding any provisions hereinafter contained to the contrary (if any) it is hereby expressly agreed by the parties hereto that the Vendor shall not be liable to the Purchaser for any failure on its part to fulfil any term of this Agreement if such fulfillment is delayed, hindered or prevented by circumstances beyond the control of the Vendor including but not limited to *force majeure*, acts of God, civil commotion, acts of war, strike or combination workmen, lockout riot, inclement weather, loss or damage by fire, flood or tempest, delay or refusal by the Authority to grant any necessary function or approval or in completing their work in the said Lot other circumstances of whatever nature beyond the control of the Vendor.

On this ground of defence the plaintiff contended that it was not true at all that the relevant authorities had caused any delay in giving their respective approvals. The plaintiff contended that in the case of the approval from the Jabatan Bekalam Air, Hulu Selangor, the defendant's application was made on 31 March 1997 and the approval was given on 7 May 1997. As such the approval was quite expeditiously granted. Based on the above facts I do agree that there was no delay in giving the approval by the Jabatan Bekalan Air.

In respect of the approval for electricity supply by the Tenaga Nasional Berhad the plaintiff alleged that the delay in obtaining the electricity supply was not the fault of TNB but solely due to the defendant's failure and/or refusal to get the land ready for electricity supply works. In her written submission, the plaintiff contended that the defendant's letter dated 17 September 1999 clearly showed that the defendant and/or its agent's had applied for electricity supply, and the related reticulation works, to be carried out in April or May 2000. By a letter dated as late as 25 May 2001 the defendant admitted to only making payment of the requisite "kos sambungan" on 17 April 2000. This is way past the date of delivery of vacant possession of the said property. The chronology of events clearly indicated that notification of readiness of the defendant's project for electricity supply works and request for contribution amount (kos

sambungan) was only made as late as 17 September 1999. From the above scenario I was quite satisfied that the delay was caused by the defendant's failure to have the said project ready for electricity supply works. The delay was not caused by TNB.

In respect of the defendant's allegation of delay in getting the approval of the sewerage treatment plant plan by Jabatan Perkhidmatan Pembentungan Kuala Lumpur (JPP) it was also contended by the plaintiff that the blame should also fall on the defendant and not on the JPP. The plaintiff explained that the defendant's consultants had submitted its plans for sewerage treatment plant five times before approval was obtained on 18 May 2001. The approval had been previously rejected because the application was not in conformity with the earlier planning approval by JPP dated 20 June 1997. I was therefore quite satisfied that the delay in obtaining the approval was due to the defendant's own faults and no blame should be made against the JPP.

I also wish to point out that if it is true that the said project was delayed by reason of the occurrence of any event as mentioned in s. 9.03 of the said agreement it would be incumbent upon the defendant to apply for extension of time to complete the said project to the housing development department. On legitimate reasons the said department would allow an extension of time to the defendant to complete the project. In this case I was unable to see any evidence adduced indicating that such extension of time had been applied and granted by the said department. In the absence of such extension of time being granted it must be assumed that the date of the delivery of vacant possession of the said property remained the same, that is 23 October 1999.

The 2nd ground relied upon by the defendant was the issue of waiver. The defendant contended that because the plaintiff did not issue notice of termination immediately after the date for the delivery of vacant possession of the said property, the plaintiff had therefore waived her rights to terminate and as such time would no longer become the essence of the contract. In support of such contention the defendant relied on the Court of Appeal case of *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89, where YA NH Chan JCA said:

> When time is no longer of the essence of the contract and no time for performance is specified, s. 47 allowed the promise to be performed within a reasonable time. If there has been unnecessary delay by the party, the other may give him a notice fixing a reasonable time at the expiration of which he will treat the contract as at an end.

The plaintiff disputed the defendant's contention that the plaintiff had waived her right to terminate. However, even assuming that she had waived her rights

the defendant had not done anything between the time she gave notice of termination to the time she filed this action in court.

The date of delivery of vacant possession was 23 October 1999. The plaintiff issued notice of termination to the defendant on 25 May 2000. The defendant disputed the notice and said that the plaintiff had no right to terminate the said agreement. Subsequently on 15 May 2001 the plaintiff filed this action in court. Up to this date the defendant had not completed the works on the said project and had not given any notice to the plaintiff giving delivery of vacant possession of the said property.

The question that is required to be determined is whether the defendant is entitled to the defence of waiver in this case. It was contended by the plaintiff that she had evinced her intention to terminate the said agreement by sending the letter dated 25 May 2000 to the defendant and even though the defendant refused to accept the plaintiff's termination of the said agreement it had knowledge that the plaintiff would take steps to terminate the said agreement. Hence when the plaintiff filed this action on 15 May 2001 reasonable time had been given to the defendant to effect delivery of vacant possession of the said property but the defendant failed to do so.

In this particular case the plaintiff had issued notice to terminate on 25 May 2000 when contractually the delivery of vacant possession should be on 23 October 1999. The defendant disputed the plaintiff's rights to terminate the said agreement. Subsequently the plaintiff filed this action on 15 May 2001. From the time notice of termination was issued to the time the plaintiff filed this action in court the defendant still could not deliver vacant possession of the said project to the plaintiff. In my view, even though no specific time for delivery had been stated by plaintiff to ask the defendant to deliver vacant possession, the period of almost one year was more than sufficient to be given to the defendant to deliver vacant possession. The period of one year is equivalent to one-third of the total contract period for the defendant to deliver vacant possession. It would be most unfair and unjust to allow the defendant to complete the works eternally. In my view on the peculiar facts of this case the doctrine of waiver as applied in the case of *Hock Huat Iron Foundry (infra)* could not be applied in this case. I find the defendant in this case guilty of inordinate delay without giving any valid reason to complete the works on the said project after a notice of termination of almost 12 months had been issued. In this case if the defendant had delivered vacant possession of the said property before the plaintiff filed this action, I would not have decided in favour of the plaintiff.

In the light of the circumstances as I have discussed above, the answer to the question posed by the plaintiff are as follows:

1. Under the circumstances of this case the plaintiff is entitled to terminate the said sale and purchase agreement;

2. The defendant is obliged to refund all monies paid by the plaintiff to the defendant; and

3. Interest at the rate of 8% per annum be paid by the defendant to the plaintiff from the date of notice of termination to the date of realisation.

I also ordered that the costs of this action be paid by the defendant to the plaintiff.